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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1029

CONREN, INC. d/b/a GREAT SCOT SUPERMARKET,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 368 F. 2d 173. The Board's decision and order (J.A. 7-30, 31-82)[1] are reported at 156 NLRB 592.

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[1] "J.A." refers to the joint appendix to the briefs in the court below.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a) was entered on October 12, 1966, and petitions for rehearing and rehearing *en banc* (Pet. App. 9a-10a) were denied on December 1, 1966. The petition for a writ of certiorari was filed on February 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are set forth in Appendix D to the petition, pp. 11a-14a.

QUESTION PRESENTED

Nine and one-half months after it lost a Board-conducted representation election, a union obtained valid cards from a majority of the employees in an appropriate unit authorizing it to represent the employees for collective bargaining purposes. The question presented is whether the employer, who engaged in extensive unfair labor practices to defeat the union's organizational effort and who does not have a good faith doubt as to the union's majority status, may nonetheless refuse to recognize and bargain with the union merely because one year has not elapsed since the election was held.

STATEMENT

1. *The Board's findings of fact.* Petitioner Conren operates a grocery supermarket at Terre Haute,

Indiana (J.A. 33). On June 7, 1963, pursuant to a petition filed by Conren, the Board conducted a representation election to determine whether Conren's employees desired Retail Clerks Local 550, Teamsters Local 144, or neither as their bargaining agent. A majority of the votes were cast for no union, and the Board certified that result (J.A. 9, 35; 717-718.) Immediately thereafter, Conren orally recognized the Employees' Committee, a union which had previously been formed with company assistance, and agreed to abide by the substantive terms of an earlier contract which had been the subject of a Board settlement agreement (J.A. 9; 518-519).[2]

In January 1964, Conren urged its employees to revive and expand the Employees' Committee, which had become dormant. The employees did so, and management representatives attended all of the meetings (J.A. 9, 51-52). Retail Clerks started a new organizing drive early in March 1964. On March 16, Supervisor Prechtel asked employee Osburn, who was active on behalf of Retail Clerks, whether he would care to "better" himself by becoming Prechtel's partner in taking over from Conren the operation of the stock department. Organizational activity on behalf of Retail Clerks had been particularly vigorous in

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[2] In December 1962, Conren, upon learning of organizational activity by Retail Clerks Local 550, signed an agreement with Teamsters Local 144 covering its employees. Retail Clerks filed a charge with the Board alleging unlawful company assistance. The case was settled when Conren agreed to withdraw recognition from Teamsters unless and until it was certified in a Board election (J.A. 9).

that department (J.A. 10, 40). On March 18, President Holdren and Prechtel signed a contract whereby Conren subcontracted the operation of the stock department to a partnership consisting of Prechtel and Osburn (J.A. 10-11, 41).

On March 19, Conren received a demand from Retail Clerks for recognition as the bargaining representative of a unit of all employees, including those in the subcontracted department, but excluding the meat department. This unit consisted of 53 employees, 28 of whom had signed cards designating Retail Clerks as their representative. Conren ignored the recognition demand (J.A. 11, 65, 72). Before and after this recognition demand, Conren supervisors told employees that the Company might reduce hours or sell the store if Retail Clerks "got in" (J.A. 10, 11, 48-50).

The employees in Prechtel's department continued their activities on behalf of Retail Clerks. On April 11, Prechtel received approval from President Holdren to discharge three of the leaders, Osburn, Fox, and Unsinger. On April 13, after Osburn refused to promise to stop his union activity, he was discharged by Prechtel. The next day, Prechtel also discharged Fox and Unsinger because of their union activity (J.A. 12, 57-59; 197-201, 477-478, 505). And, on April 15, Prechtel ordered temporary employee Edwards, who had been scheduled to work for three days, out of the store when, on finding his time card missing, he sought the aid of Osburn (J.A. 12; 202-204, 319-321, 479-485, 660-661).

2. *The Board's conclusions and order.* The Board found that Conren instigated the original formation

and later revival of the Employees' Committee, actively participated in its administration, and supported it in violation of Section 8(a)(2) of the Act (J.A. 54-56, 22-23). It further found that Conren restrained and coerced its employees in violation of Section 8(a)(1) by, *inter alia*, threatening employees with economic reprisals for union adherence and by transferring, pursuant to a sham contract, the employees in the stock department to Prechtel (J.A. 49-50, 20-22). The Board also found that the discharges of Fox, Unsinger, Osburn, and Edwards were discriminatorily motivated and thus violated Section 8(a)(3) and (1) (J.A. 63-64, 16). Finally, the Board found that Conren violated Section 8(a)(5) and (1) by refusing, on and after March 19, 1964, to recognize and bargain with Retail Clerks, since the Company had no good-faith doubt that the Union possessed valid authorizations from a majority of the employees in an appropriate unit (J.A. 17-20).

The Board ordered Conren to cease and desist from the unfair labor practices found; to disestablish and withhold recognition from the Employees' Committee; upon request, to bargain collectively with Retail Clerks; to offer reinstatement to Fox, Osburn, and Unsinger; and to reimburse them and Edwards for any loss of earnings resulting from the discrimination (J.A. 25-28).

3. *The decision of the court of appeals.* The court of appeals sustained all of the Board's unfair labor practice findings and enforced its order in full (Pet. App. 1a-4a). Judge Kiley, however, would not have

enforced the portion of the order requiring Conren to bargain with Retail Clerks, on the ground that the policy of Section 9(c)(3) of the Act (discussed *infra*) relieved Conren of a bargaining obligation for one year (Pet. App. 4a-7a).

ARGUMENT

Petitioner does not contest the findings of the Board, sustained by the court of appeals, that it engaged in extensive unfair labor practices in an effort to defeat the organizational efforts of Retail Clerks. Nor does petitioner contest the Board's and court's findings that, when Retail Clerks requested recognition on March 19, 1964, a majority of the employees in an appropriate unit had validly authorized it to represent the unit and petitioner had no good-faith doubt as to Retail Clerks' majority status. Petitioner contends, however, that it was nonetheless free of any obligation to recognize and bargain with Retail Clerks because one year had not elapsed since that union had lost a Board-conducted election. This contention was properly rejected by the court below and does not warrant review by this Court.

1. Petitioner's contention that it was not obligated to honor Retail Clerks' request for recognition, which was made nine and one-half months after that union had lost a Board-conducted election, rests on the premise that Section 9(c)(3) of the Act suspended its bargaining obligation for a full year. But, as the court below correctly concluded (Pet. App. 2a-3a), neither the language of that section nor its legislative history justifies such an assumption.

Section 9(c)(3) provides: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." On its face, this provision merely bars the conduct of a *second election* within a twelve-month period; it says nothing about a second effort to secure recognition where, as here, the union is able to establish its majority by means other than an election. Since Congress was aware that a union's majority status may be established either by a Board election or by such other means as authorization cards (see *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72), it is reasonable to conclude that, when Congress specified *election* in Section 9(c)(3), it was only intending to limit that method. As this Court noted in reviewing the statutory provisions in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 101, the statute does not relieve an employer of the "duty to bargain with an uncertified union that had a clear majority." This conclusion is confirmed by the legislative history of that section, which shows that Congress' basic objective was to avoid disrupting the employer's plant with too frequent Board elections.[3] There is no evidence of an intention to permit an employer to ignore the duty of collective bargaining altogether for a full year.

Nor does the general policy favoring "industrial

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[3] See 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948) 1013, 1639; 93 Cong. Rec. 3838, 7529. See also *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 100-101, n. 8.

peace" support petitioner's interpretation. Clearly the Act does not forbid organizational activity within a year of a "no union" election, and when that activity bears fruit, it does not subserve industrial peace for the employer to thwart the expressed views of a majority of his employees. Thus, as this case plainly demonstrates, it is neither equitable nor does it further the Act's objectives to permit an employer to use Section 9(c)(3) as a shield to ward off bargaining with the *bona fide* representative of his employees, particularly while he is abridging employee rights by extensive unfair labor practices, including the recognition of a company-assisted union.

2. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, plainly does not require a contrary conclusion. There the Court upheld the Board's finding that the employer was not justified in withdrawing recognition from a certified union when, a week after the election was held and a day after the certification issued, a majority of the employees in the unit sought to repudiate the union. It does not follow from this decision that an employer may refuse to bargain with a union lawfully representing a majority of its employees for at least a year after an election at which no union obtains certification. Indeed, the Court in *Brooks* expressly noted the distinction between the situation involved there and that present here. Referring to the contention "that since a bargaining agency may be ascertained by methods less formal than a supervised election, informal repudiation should also be sanctioned where decertification by another election is precluded," the Court pointedly

observed, "This is to make situations that are different appear the same" (348 U.S. at 103-104). While the Court referred to the interest in promoting and respecting the solemnity of the election (348 U.S. at 99), a consideration also relevant here, none of the other factors the Court relied on in *Brooks* to support the Board's action requires reversal of the Board here.[4]

Moreover, *Brooks* recognizes that the one-year period is not inflexible, but can be shortened under "unusual circumstances." At least where, as here, the employer has engaged in extensive unfair labor practices following the election, the Board is not unreasonable in concluding that he cannot at the same time claim a full year's exemption from his bargaining obligation under the Act, if, shortly before the end of that period, the union is able to muster the support of a majority of the employees.[5]

3. *National Labor Relations Board* v. *Blades Mfg. Corp.*, 344 F. 2d 998 (C.A. 8), relied on by petition-

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[4] The Court in *Brooks* was concerned that a union should be given ample time for carrying out its mandate; that an employer should not be encouraged to undermine bargaining activities by the hope that he can thus cause the erosion of the union's majority; that even a conscientious employer might be reluctant in bargaining if the employees, on their own, could freely repudiate the union at any time; and that certified unions facing competition from other unions should not be threatened by short-term recall (348 U.S. at 100).

[5] Cf. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, where the dissipation of the union's majority was attributable to the employer's unfair labor practices—a situation which the Court in *Brooks* specifically distinguished from the situation there presented (see 348 U.S. at 102).

er, is also inapposite. In that case, there had been two elections within a twelve-month period, and the union's majority status depended solely on the results of the second election. Since the court of appeals found that the Board had improperly set aside the first election, which the union lost, it necessarily followed that the second election was barred by Section 9(c)(3). Here, on the other hand, there was no second election within a twelve-month period—the Retail Clerks' majority was established not on the basis of a Board-conducted election, but through valid authorization cards signed by the employees. Nothing in the Eighth Circuit's opinion suggests that it would reach a result different from that of the court below on the present set of facts.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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